No. 93-74 (18)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION; PULLMAN LEASING COMPANY; RAILBOX COMPANY; RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

BETTY JO CHRISTIAN *
TIMOTHY M. WALSH
JERALD S. HOWE, JR.
RODERICK L. THOMAS
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
* Counsel of Record

Counsel for Amicus Curiae Association of American Railroads

Dated: September 2, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

37 pp

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BRIEF FOR THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a voluntary, not-for-profit incorporated trade association of the Nation's railroads.[1] AAR's members operate approximately 76% of the line haul mileage, employ approxi-

[1] Petitioner and respondents have consented to the filing of this brief. The parties' consent letters have been filed with the Clerk.

mately 90% of the workers, and produce approximately 91% of the freight revenues of all railroads in the United States. Each of AAR's members is an interstate carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. On matters of common concern, AAR represents its members before courts, agencies, and the Congress.

This case involves Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act"), 49 U.S.C. § 11503 (1988) (hereinafter "Section 11503"), which prohibits state tax discrimination against railroads. AAR was one of the leading proponents of Section 11503. AAR and others presented voluminous evidence over a 15-year period, from which Congress concluded that tax discrimination against railroads was pervasive and imposed substantial burdens on interstate commerce.

As a representative of the railroads that Section 11503 was designed to protect, AAR maintains an acute interest in its interpretation and application. AAR participates as an *amicus curiae* in cases that threaten to restrict the application of the statute as Congress enacted it. AAR filed an *amicus* brief in *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987), the only Section 11503 case that this Court has previously heard. AAR appeared in the courts below as an *amicus curiae*. Because the interpretation of Section 11503 to respondent carlines in this case will apply to railroads as well, AAR's members have a strong interest in the proper resolution of this case.

The Nation's railroads also have a compelling financial interest in the taxation of the respondent carlines. The carlines furnish railroad cars either directly to the railroads, or to rail shippers for subsequent use by the railroads. The relationships between the railroads and the carlines ensure that the economic burden of discriminatory state taxation of carlines is ultimately borne by the railroads and their customers.

"The use of private cars on the railroads dates from the very beginning of transportation by rail." 2 I. L. Sharfman, *The Interstate Commerce Commission* 120 (1931) ("Sharfman"). As rail transportation developed in the nineteenth century, railroads often were unable to satisfy the demand by shippers for sufficient cars and for cars adapted to the peculiar qualities of certain commodities. *See, e.g., In re Private Cars*, 50 I.C.C. 652, 657 (1918). Private carlines were established to provide those cars, in particular, specialized equipment such as "tank cars for the transportation of oil and other liquids, refrigerator cars for the transportation of fruits and meat products, coal cars, and stock cars." Sharfman, at 120. By the 1880's, privately owned cars were used extensively to transport commodities in interstate commerce. *Id.; Private Cars*, 50 I.C.C. at 657, 672.

The interdependent relationship between the railroads and the carlines was cemented by the Hepburn Act of 1906, which amended the Interstate Commerce Act to give the ICC jurisdiction over railroad car service. The Hepburn Act contained two key provisions: it required railroads to furnish safe and adequate car service to meet the needs of the shipping public, and it gave the ICC authority to regulate the compensation and other arrangements between railroads and the companies that supply cars. *See, e.g.*, 49 U.S.C. §§ 11121, 11122 (1988). Pursuant to that authority, the ICC has long required that all cars be accepted by the railroads in interchange service, regardless of ownership.[2] The carlines are thus an integral part of the system through

[2] *See Investigation of Adequacy of R.R. Freight Car Ownership, Car Utilization, Distribution Rules, & Practices*, 362 I.C.C. 844, 844 (1980) (noting that free interchange of cars became a legal obligation in 1911).

which railroads fulfill their statutory obligation to provide safe and adequate car service.

This interrelationship between the carline and railroad industries means that any economic burden on the carlines also burdens the railroads and their customers. Cars owned by the carlines are subject to a "mileage allowance" paid by the railroads,[3] which includes reimbursement for property taxes paid on the cars. Thus, any discriminatory state taxes imposed on the carlines must inevitably be passed on to the railroads.

Furthermore, a number of the carlines involved in this case are wholly owned by the railroads. These carlines were formed to respond to a surge in demand for highly specialized cars at a time when most individual railroads were unable to invest sufficient capital to remedy equipment shortages. Respondent Trailer Train Company, for example, was organized in 1955 by its owner-railroads to meet the demand for a nationwide fleet of flatcars that could accommodate truck trailers. *See American Rail Box Car Co. & Trailer Train Co.—for Approval of the Pooling of Car Serv. with Respect to Box Cars*, 347 I.C.C. 862, 866 (1974). Trailer Train proved to be so successful that, some nineteen years later, when serious boxcar shortages arose, the industry set up respondent Railbox Company. The role of Railbox, a wholly-owned subsidiary of Trailer Train, is to provide the industry with standard-design, wide-door boxcars of general usefulness, available to all of the company's railroad owners. *Id.* at 867. Respondent Railgon Company, also a wholly-owned subsidiary of Trailer Train, was similarly organized by

[3] *See, e.g., Cancellation of Private Car Allowances on B & O Chicago Terminal R.R. & Indian Harbor Belt R.R.*, 322 I.C.C. 565, 570-71 (1964), *aff'd*, 279 F. Supp. 270 (N.D. Ill.), *aff'd*, 389 U.S. 88 (1967) (mem.).

the railroad industry in 1980 to satisfy a need for standardized, heavy-duty, free-running gondola cars.[4]

The cars of Trailer Train, Railbox, and Railgon are governed by national freight car pooling agreements that ensure that the railroads ultimately pay the cost of ownership, including any discriminatory taxes. Under the ICC-approved contracts by which those respondents provide railroads with cars, all state taxes are paid by the carlines as expenses of operation. These expenses are then passed on directly to the railroads by means of user charges, which cover state taxes and all other expenses.[5]

In short, the carlines are an integral part of the Nation's railway system. Due to the economic relationships between the carline industry and the railroads, discriminatory taxation of carlines directly increases the cost of rail transportation, places railroads at a competitive disadvantage, adversely affects the earnings of railroads, and ultimately increases transportation costs borne by consumers.

SUMMARY OF ARGUMENT

Congress enacted Section 11503 in response to the longstanding financial crisis of the Nation's railroads. After fifteen years of study, Congress concluded in 1976 that the elimination of state tax discrimination against railroads was essential.

The plain language of Section 11503 reflects comprehensive legislation to end all forms of state tax discrimination against railroads. Subsections (b)(1) through (b)(3) prohibit the then-most-prevalent means by which

[4] *See Investigation of Adequacy of R.R. Freight Car Ownership*, 362 I.C.C. at 871 (citing Finance Docket No. 29121, *Railgon Co. and Trailer Train Co.—Pooling of Car Serv. Regarding Gondola Cars* (not printed), decided February 25, 1980, and affirmed on appeal May 13, 1980)).

[5] *See, e.g., American Rail Box Car Co.*, 347 I.C.C. at 874.

states and localities discriminated against railroad property—imposing higher assessment ratios and higher tax rates for railroad property than that generally applicable to non-railroad property. 49 U.S.C. §§ 11503(b)(1)-(b)(3). But Congress recognized that states were adept at finding more sophisticated means "to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." *Western Airlines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 131 (1987). Thus, toward the end of the legislative process, subsection (b)(4) was added as a catch-all provision to ensure the elimination of state tax discrimination in *all* forms. Moreover, as Section 11503 neared passage, Congress *rejected* efforts by certain states to seek greater leeway for tax discrimination against railroad property through "classification" schemes.

Lower federal courts have uniformly and correctly concluded that the catch-all subsection (b)(4) proscribes tax exemptions that discriminate against railroads. 49 U.S.C. § 11503(b)(4). Petitioner relies upon isolated segments of legislative history to question this uniform authority, and to carve out an exception for discriminatory state tax exemptions. Such resort to legislative history is unnecessary and inappropriate where a statute speaks clearly, as does Section 11503. *Oklahoma Tax Comm'n*, 481 U.S. at 461. The statute simply cannot be read in favor of a loophole for discrimination-by-exemption. Petitioner's reading of the statute would also lead to an absurd result: states would be prohibited from assessment ratio discrimination that is anything more than *de minimis*, but would be given a green light to tax railroad property while fully exempting other commercial and industrial property from taxation.

In determining whether particular state tax exemptions result in discrimination against railroads, subsection (b)(4) requires a comparison of the tax treatment of similar classes of property of other commercial and industrial taxpayers. For instance, taxation of railroad personal property is to be compared to taxation of the personal property of other businesses. Evaluation of the "overall fairness" of the state's tax system, as urged by petitioner, has properly been rejected by lower courts. Such an inquiry would put enormous burdens upon courts and litigants seeking to challenge a particular tax.

Once state tax exemptions have been found to violate subsection (b)(4), lower courts should retain the discretion to fashion an appropriate remedy based on the facts and circumstances of the particular case. In deciding whether to grant "proportional" relief or to enjoin the tax in its entirety, courts should properly consider a number of factors. These factors would include, *inter alia*, the extent of the discrimination, the difficulty in crafting a precise form of relief when faced with a particularly complicated web of exemptions, and the state's past history with respect to state tax discrimination and compliance with Section 11503.

ARGUMENT

I. SECTION 11503 PROTECTS RAILROADS AND CARLINES FROM STATE TAX DISCRIMINATION IN ANY FORM

A. The Origin and Scope of Section 11503

Efforts by states to extract a disproportionate share of tax revenues from the railroad industry have long been a matter of national concern. As early as 1944, about half of the states admitted to Congress that they were engaged in excessive taxation of railroads. *See* S. Rep. No. 630, 91st Cong., 1st Sess. 4 (1969) (quoting H.R. Doc. No. 160, 78th Cong., 2d Sess. 124-25 (1944)). Indeed, as this Court has noted, Congress itself ultimately concluded that " 'railroads are over-taxed by at least $50 million each year.' " *Oklahoma Tax Comm'n*, 481 U.S. at 457 (citing H.R. Rep. No. 94-725, at 78 (1975)).

Congressional concern over the impact of discriminatory state taxes was fueled by the drastic financial decline of the railroad industry following the Second World War. That concern was first highlighted in the 1961 "Doyle Report," which laid blame for much of the industry's difficulty on outmoded and burdensome federal and state laws and regulations.[6] The Doyle Report provided the first detailed statement of the impact of state and local tax discrimination against railroads. Over the next fifteen years, the financial instability of the railroads and the need for federal intervention became increasingly acute.[7] State tax discrimination against interstate railroads was a significant element of the problems that led to the near collapse of the rail industry.

In 1976, Congress enacted the first of the two statutes that transformed the regulatory regime and set the stage for the recovery of the railroad industry—the Railroad Revitalization and Regulatory Reform Act of 1976 ("4-R Act").[8] Section 11503 of the 4-R Act declares discrim-

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[6] The "Doyle Report" was issued under the staff direction of Major General John P. Doyle pursuant to Senate resolutions. *See* Senate Comm. on Commerce, Special Study Group on Transportation Policies in the United States, S. Rep. No. 445, 87th Cong., 1st Sess. (1961).

[7] *See, e.g.*, John F. Due, *A Comment on Recent Contributions to the Economics of the Railroad Industry*, 13 J. Econ. Literature 1315, 1315 (1975) (inadequate earnings of the railroad industry a problem "endemic for two decades"); Philip Weinberg, *Working on the Railroad: An Urgent Agenda for Congress*, 20 N.Y.L.F. 731 (1975); George S. Prince, *Railroads and Government Policy—A Legally Oriented Study of an Economic Crisis*, 48 Va. L. Rev. 196, 202, 232 (1962) (railroad "financial plight" due in part to discriminatory state taxation).

[8] The Staggers Rail Act of 1980, enacted four years later, provided for even greater relaxation of the regulatory restraints on the railroad industry. Pub. L. No. 96-448, 94 Stat. 1895 (codified, as amended, in scattered sections of 49 U.S.C., 45 U.S.C., and 11 U.S.C.).

inatory state taxation of railroads to be an unreasonable burden on interstate commerce, and authorizes federal courts to provide relief from it.[9] This was no accident; Congress viewed the elimination of discriminatory taxes on railroads as essential to restoring their financial stability.[10]

When, after fifteen years of study, Congress enacted Section 11503, it legislated comprehensively to end all forms of state tax discrimination against railroads. The legislation was intended " 'to put an end to the widespread practice of treating for tax purposes the property of [railroads] on a different basis than other property in the same taxing district.' " S. Rep. No. 630 at 2 (citation omitted). The structure of the statute reflects this intention.

The statute focuses first on the then-most-prevalent means by which states and localities were discriminating against railroad property. Congress noted that at that time, states most frequently accomplished discriminatory taxation either by taxing railroad property at higher rates

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[9] The original language of Section 306 of the 4-R Act, first codified at 49 U.S.C. § 26c (1976), was slightly altered in its 1978 recodification at 49 U.S.C. § 11503. *See* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* That recodification, however, merely "restate[d]" existing law and "may not be construed as making a substantive change." *Id.* § 3(a), 92 Stat. at 1446. The original language thus controls. *See Oklahoma Tax Comm'n*, 481 U.S. at 457 n.1. For the convenience of the Court, AAR will generally refer to the recodification, 49 U.S.C. § 11503, but will discuss the original language of Section 306 where appropriate.

[10] Section 11503 has been used as a model for measures designed to protect other interstate carriers. *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, § 31, 94 Stat. 793, 823 (codified at 49 U.S.C. § 11503a (1988)) (trucking companies); Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, § 20, 96 Stat. 1102, 1122 (codified at 49 U.S.C. § 11503a (1988)) (bus companies); and Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, tit. 5, § 532, 96 Stat. 671, 701 (codified at 49 U.S.C. app. § 1513(d) (1988)) (airlines).

than other commercial and industrial property, or by varying the assessment ratios. *See* S. Rep. No. 1085, 92d Cong., 2d Sess. 5 (1972); S. Rep. No. 630 at 6; S. Rep. No. 1483, 90th Cong., 2d Sess. 2 (1968). Subsections (b)(1) through (b)(3) thus explicitly prohibit states from imposing higher assessment ratios and higher tax rates for railroad property than those generally applicable to non-railroad property.[11]

But Congress did not stop there. Recognizing that it would do little good to prohibit the then-current, relatively straightforward techniques of discrimination if this simply led the states to find more sophisticated means of accomplishing the same result, Congress added a fourth subsection, which made it unlawful to "impose another tax that discriminates against a rail carrier." 49 U.S.C. § 11503(b)(4). As originally enacted, this subsection prohibited the "imposition of any other tax which results in discriminatory treatment" of railroads. § 306(1)(d), Pet. App. 39. This last prohibition—the catch-all subsection (b)(4)—was added toward the end of the long legislative process that preceded the enactment of Section 11503.[12] Its inclusion in the statute reflects Congress's

[11] Specifically, subsections (b)(1) through (b)(3) forbid a state or locality to:

> (1) assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.
>
> (2) levy or collect a tax on an assessment that may not be made under clause (1) of this subsection.
>
> (3) levy or collect an ad valorem property tax on rail transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction . . . .

49 U.S.C. §§ 11503(b)(1)-(b)(3).

[12] A provision similar to subsection (b)(4) first appeared in H.R. 12891, in 1974. *Hearings Before the House Committee on Interstate and Foreign Commerce and the Subcommittee on Transportation and Aeronautics*, 93d Cong., 2d Sess., Vol. 16, at 24 (1974).

recognition of the wide array of means through which states could achieve tax discrimination against railroads, and its determination that such discrimination be ended, however it might be accomplished.[13]

As the fifteen-year struggle toward enactment indicates, Section 11503 was not willingly accepted by the states, many of which had long depended on disproportionate tax revenues from railroads and were reluctant to face the prospect of either cutting their budgets or increasing taxes on their own residents. Congress did not turn a totally deaf ear to their pleas, but the relief it provided the states was extremely limited. First, to protect the states' short-term fiscal interests, Congress gave them a three-year grace period to bring their practices into compliance, § 306(2)(b), Pet. App. 40. In addition, to protect the states against a multitude of lawsuits over minute variations in taxes, Congress specified more than a five percent differential would be required to support relief based on assessment ratio differentials. 49 U.S.C. § 11503(c). Other requests to relieve the states from the full force of the antidiscrimination mandate—including an exception to permit states to "classify" railroad property in ways that were "reasonable" but different from

[13] Because Congress was dissatisfied with the remedies available in state courts, Section 11503 granted the federal courts jurisdiction over claims of state tax discrimination against railroad property, without regard to the amount in controversy or the citizenship of the parties and notwithstanding the Tax Injunction Act, 28 U.S.C. § 1341 (1982). Congress concluded that the Tax Injunction Act had deprived railroads of access to federal courts, but that states did not provide an adequate state court remedy. *See, e.g.*, S. Rep. No. 630 at 6-7. In a number of states, for example, railroads were required to bring suit against every county in which the carrier operated because state law required suit against the tax collectors rather than the tax assessors. *See* H.R. Rep. No. 725, 94th Cong., 1st Sess. 77 (1975); S. Rep. No. 1483 at 6.

other taxpayers—were soundly rejected. S. Conf. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976).

After the enactment of Section 11503, some states promptly brought their tax laws into compliance with the statute. Others, however, continued to seek ways to tax railroads disproportionately. One of the most common maneuvers was to equalize tax rates and assessment ratios —but then simply to overvalue the railroad property, so that it continued to yield higher tax revenues. This ploy was struck down by this Court under subsections (b)(1) through (b)(3) in *Oklahoma Tax Comm'n*, 481 U.S. 454, which held that the statute encompasses discrimination stemming from the overassessment of railroad property, regardless of discriminatory intent.

The lower courts have dealt with a myriad of techniques designed to perpetuate excessive taxation of railroads, enjoining them as a violation of Section 11503. This has included, for example, a Wisconsin occupational tax on owners and operators of "iron ore concentrates docks" that affected only railroads because they were the only operators of such docks, *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); a private car tax imposed by Missouri solely on freight line companies, *Trailer Train Co. v. State Tax Comm'n of Mo.*, 929 F.2d 1300 (8th Cir.), *cert. denied*, 112 S. Ct. 169 (1991); a Louisiana tax on the intrastate gross receipts of "public utilities" which included only railroads and a few other business taxpayers, *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 370 (5th Cir. 1987); a Kentucky law that classified railroad cars as public utility property and taxed them at a higher rate of assessed value, *General Am. Transp. Corp. v. Kentucky*, 791 F.2d 38 (6th Cir. 1986); Iowa's taxation of railroad personal property without benefit of rollbacks and credits accorded to other personal property, *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985); a Florida law according tax benefits to owners of other commercial and industrial property, but not to railroads, *Louisville & N.*

R.R. v. Department of Revenue, 736 F.2d 1495 (11th Cir. 1984); laws assessing railroad real property annually, while other commercial and industrial real property was assessed less frequently, *Atchison, T. & S.F. Ry. v. Lennen*, 732 F.2d 1495, 1499 (10th Cir. 1984) (Kansas); *Clinchfield R.R. v. Lynch*, 700 F.2d 126, 130 (4th Cir. 1983) (North Carolina); Alabama's license tax on railroads, *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); North Dakota's taxation of railroad personal property but not other commercial personal property, as well as discriminatory assessment of railroad property, *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); Iowa's overvaluation of railroad property, *Burlington N. R.R. v. Bair*, 648 F. Supp. 91 (S.D. Iowa 1986); Arizona's improper classification of "other" commercial and industrial property relative to railroad property, *Atchison, T. & S.F. Ry. v. Arizona*, 559 F. Supp. 1237, 1240 (D. Ariz. 1983); and a Louisiana law classifying railroad property as "public service" property and assessing it at a higher percentage of true market value, *Louisville & N. R.R. v. Louisiana Tax Comm'n*, 498 F. Supp. 418, 420 (M.D. La. 1980).

In all of these cases, the lower federal courts have correctly concluded that the purpose of Section 11503 is " 'to prevent tax discrimination against railroads in *any form whatsoever*,' " Pet. App. 12 (citations omitted), and have struck down the various techniques by which states have continued to seek to extract disproportionate tax revenues from railroads.[14] What is now before this Court

[14] *See Trailer Train Co. v. Leuenberger*, 885 F.2d 415, 416-17 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989) (citing *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 210 (8th Cir. 1981) and *Trailer Train Co. v. Bair*, 765 F.2d 744, 745 (8th Cir. 1985)); *see also Southern Ry. v. State Bd. of Equalization of Ga.*, 715 F.2d 522, 528 (11th Cir. 1983) (Section 11503 forbids discriminatory state taxation "in all of its guises"), *cert. denied*, 465 U.S. 1100 (1984).

is simply another one of those techniques—the imposition of ostensibly equal taxes coupled with the exemption of substantial amounts of non-railroad property that would otherwise be subject to those taxes.[15]

B. Subsection (b)(4), Which Prohibits "Any Other Tax" That Results in Discriminatory Treatment of Railroads, Prohibits Discriminatory Property Tax Exemptions

While subsections (b)(1) through (b)(3) proscribe specific aspects of assessment ratio and tax rate discrimination, subsection (b)(4), as originally enacted, broadly prohibits "any other tax" that results in discriminatory treatment of rail carriers.[16] Consistent with the statute's plain language, all of the lower federal courts that have addressed the issue have held that this catch-all provision encompasses *all* other state taxes that result in the discriminatory treatment of railroads.[17] That conclusion is

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[15] The Ninth Circuit's opinion demonstrates that 67% of non-railroad *personal* property in Oregon is exempt from taxation. This figure is derived by dividing the amount of exempt personal property ($9.7 billion) by the amount of exempt personal property plus the amount of taxed personal property ($9.7 billion plus $4.8 billion). *See* Pet. App. 18 n.4.

[16] Section 11503(b)(4), as originally enacted, prohibited "any other tax *which results in* discriminatory treatment of a common carrier by railroad." § 306(1)(d), Pet. App. 39 (emphasis added). The recodification prohibits "another tax that discriminates against a rail carrier." 49 U.S.C. § 11503(b)(4). Since it was the actual language enacted by Congress, the original language controls. *See supra* note 9.

[17] *See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991); *Department of Revenue of Fla. v. Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987), *cert. denied*, 112 S. Ct. 169 (1991); *Kansas City S. Ry. v. McNamara*, 817 F.2d 368, 373 (5th Cir. 1987); *Richmond, F. & P. R.R. v. Department of Taxation of Va.*, 762 F.2d 375, 379 (4th Cir. 1985); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981); *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

plainly correct, since any other interpretation would open a loophole in the statute that Congress did not intend.

Despite the unambiguous language of the statute, petitioner and the *amici* supporting petitioner argue that subsection (b)(4) was not intended to cover tax exemptions that discriminate against railroads. To support that argument, they rely on cases finding that subsections (b)(1) through (b)(3), which prohibit tax rate and assessment ratio discrimination, do not protect against the exemption of non-railroad property from tax, because only property that is "subject to a property tax levy" is included in the comparison class under these subsections.[18] But those cases are wholly irrelevant to subsection (b)(4), which contains no such limiting language. Indeed, the absence of the phrase "subject to a property tax levy" in subsection (b)(4)—in contrast to its presence in subsections (b)(1) through (b)(3) by the use of the defined term "commercial and industrial property"—only confirms that Congress did not intend such a limitation on subsection (b)(4) challenges.

Petitioner can point to no legislative history to support its argument that Congress intended to carve out such an exception from a comprehensive statute and the all-inclusive "any other tax" language. As the Fourth Circuit has recognized, "nothing in the committee reports, debates, or other legislative history focuses specifically on the purpose" of subsection (b)(4). *Richmond, F. & P. R.R. v. Department of Taxation of Va.*, 762 F.2d 375, 379 (4th Cir. 1985); *cf. Oklahoma Tax Comm'n*, 481 U.S. at 461 (finding an inquiry into the legislative history of Section 11503 "inconclusive and irrelevant").

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[18] *See, e.g., Department of Revenue of Fla. v. Trailer Train Co.*, 830 F.2d 1567 (11th Cir. 1987); *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 553 (4th Cir. 1986); *Burlington N. R.R. v. Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *ACF Indus., Inc. v. Arizona*, 714 F.2d 93, 94 (9th Cir. 1983).

Petitioner's interpretation of Section 11503 would in effect impose a major limitation on the statute that Congress considered and rejected. During the legislative development of Section 11503, Congress came under heavy pressure from the states to permit them to "classify" property in "reasonable" ways that might not treat railroads equally with other, in-state taxpayers, but an amendment to that end was voted down.[19] Exemption, of course, is simply classification by another name, and in an extreme form. To permit exemption discrimination under Section 11503 would be to enact judicially the very sort of amendment that Congress rejected as inconsistent with the purpose of the statute.

The Solicitor General has urged this Court to remand this case to permit Oregon an opportunity to "justify" its discrimination by showing "significant differences between the two classes" of property. U.S. Br. at 18. This view directly conflicts with the original language of Section 11503, which conclusively determined that state tax discrimination constitutes "unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." § 306(1), Pet. App. 39; *see also* 49 U.S.C. § 11503(b). Congress thus provided no statutory authority for permitting a state to demonstrate in a particular case that discrimination was "reasonable" or "just." This view is solidified by the original language of subsection (b)(4), which prohibited "any other tax which *results in* discriminatory treatment" of railroads. § 306(1)(d), Pet. App. 39. As this Court recognized in *Oklahoma Tax Comm'n*, 481 U.S. at 463, "Subsection (b) speaks only in terms of

[19] S. Conf. Rep. No. 595 at 166; *see also Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981) ("Congress rejected a proposed [version of Section 11503] which would have granted an exemption to states with a constitution providing for a 'reasonable classification of property.'"); *cf. Trailer Train Co. v. State Tax Comm'n of Mo.*, 929 F.2d 1300, 1303 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 169 (1991); *Clinchfield R.R. v. Lynch*, 784 F.2d 545, 551-52 (4th Cir. 1986); *Alabama Great S. R.R. v. Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981).

'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer to the intent of the actor." While this Court was specifically addressing an intent requirement for overvaluation claims under subsection (b)(1), the reasoning is equally applicable here: the results test adopted by Congress left no room in subsection (b)(4) for an inquiry into intent or justification.

Nor is there any basis for petitioner's argument that subsection (b)(4) prohibits only discriminatory taxes enacted "in lieu" of property taxes. The AAR representative on whose congressional testimony petitioner relies addressed the problem of "in lieu" taxes simply because this was the form of discrimination, apart from tax rate and assessment ratio discrimination, that was then most prevalent. But there is no indication that his concerns were limited to this particular discrimination technique. Moreover, while the House Report's characterization of subsection (b)(4) would have limited the provision to "in lieu" taxes, the Conference Report rejected that characterization. S. Conf. Rep. No. 595 at 165-66.

In any event, petitioner's reliance on isolated snippets of legislative history cannot be reconciled with the broad statutory language that Congress actually used. This Court has frequently recognized that "unless exceptional circumstances dictate otherwise," when the Court "find[s] the terms of a statute unambiguous, judicial inquiry is complete." *Oklahoma Tax Comm'n*, 481 U.S. at 461 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *see also Patterson v. Shumate*, 112 S. Ct. 2242, 2248 (1992). Congress expressly prohibited "any other tax" that "results in discriminatory treatment" of railroads. § 306(1)(d), Pet. App. 39. This language is unambiguous and clearly cannot support any inference of an intent to limit subsection (b)(4) to discriminatory "in lieu" taxes. *See, e.g., Burlington N. R.R. v. City of Superior*, 932 F.2d 1185, 1186-87 (7th Cir. 1991) (collecting cases).

Section 11503 protects railroads from excessive and unfair state taxation by tying their fate to that of local taxpayers, who have the political power to oppose oppressive taxes. As this Court pointedly noted in *Western Airlines, Inc. v. Board of Equalization of S.D.*, 480 U.S. 123, 131 (1987), Section 11503 was designed to curb the "temptation [on the part of state and local governments] to excessively tax nonvoting, nonresident businesses in order to subsidize general welfare services for state residents." If the vast majority of other commercial and industrial property may be exempted from the relevant taxes without also exempting the property of railroads, the political connection is broken and the statute's protection against discrimination is lost.[20] Were this Court to interpret subsection (b)(4) as not covering discrimination resulting from exemption of other commercial and industrial property, it would open a loophole large enough to engulf the statute.[21]

Petitioner's interpretation is also nonsensical. Petitioner contends that Section 11503 prohibits assessment ratio discrimination that is anything more than *de min-*

[20] Subsection (b)(4) has generally been interpreted to require comparison with the commercial and industrial taxpayers or property generally. There are, however, cases in which a violation of the subsection has been found to occur because railroads, when compared to other modes of transportation, have been put at a competitive disadvantage by the particular tax at issue. *See Burlington N. R.R. v. Commissioner of Revenue*, No. 5703, 1993 WL 1856 (Minn. Tax Ct. Jan. 4, 1993); *National R.R. Passenger Corp. v. State Bd. of Equalization of Cal.*, 652 F. Supp. 923 (N.D. Cal. 1986); *Atchison, T. & S.F. Ry. v. Bair*, 338 N.W.2d 338 (Iowa 1983), *cert. denied*, 465 U.S. 1071 (1984); *Burlington N. R.R. v. Triplett*, 682 F. Supp. 443 (D. Minn. 1988).

[21] As this Court has often held, a statute may not be interpreted in a way that would make it ineffective. *See, e.g., American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 513 (1981); *United States v. Shirey*, 359 U.S. 255, 259-60 (1959); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1940); *Graham & Foster v. Goodcell*, 282 U.S. 409, 421-22 (1931).

imis, but permits wholesale discrimination through exempting other commercial and industrial property altogether. This ignores the reality of discriminatory exemptions. Taxing railroad property while exempting non-railroad commercial and industrial property from taxation is perhaps the ultimate form of discrimination. If discrimination through selective exemption is permitted—particularly in the present era of intense fiscal pressures on state and local government—the result will be a rapid return to the old days of unbridled tax discrimination against railroads.

The various ways in which exemptions can be manipulated to perpetuate tax discrimination against railroads are well illustrated by cases that have come before the lower federal courts. For example, in *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d at 210, North Dakota had adopted a statute that exempted the personal property of locally assessed businesses, but included personal property and trade fixtures in the assessment of centrally assessed railroad property. As the Eighth Circuit correctly noted, the statute "impose[d] a tax on a class of rail transportation property that is not imposed on other nonrailroad property of the same class." *Id.*

In *Burlington N. R.R. v. Bair*, 766 F.2d at 1223-25, Iowa had "rolled back" assessed values of personal property and granted tax credits to non-railroads, effectively exempting 95% of personal property owners from taxation. *Id.* at 1224. Railroad property, however, was centrally assessed, without any differentiation between real and personal property—and without any rollbacks. The Eighth Circuit had no difficulty in concluding that "Iowa's classification scheme result[ed] in obvious discrimination," since railroads could not obtain the rollbacks or tax credits. *Id.*

In addition to these reported decisions, there are a number of cases currently pending in which exemptions

that discriminate against railroads have been challenged. For example, the Atchison, Topeka and Santa Fe Railroad has brought a subsection (b)(4) challenge to Missouri's imposition of ad valorem taxes on railroad personal property, while not taxing as much as 75% of other commercial and industrial personal property. The district court has preliminarily enjoined the collection of railroad ad valorem taxes, and has stayed the action pending this Court's decision in this case. *See Atchison, T. & S.F. Ry. v. Missouri State Tax Comm'n,* Nos. 90-4391-CV-C-9, 91-1064-CV-W-3, and 92-1148-CV-W-1 (W.D. Mo.).

If discrimination resulting from exemptions were held to be outside the bounds of Section 11503, there is little doubt that some states would rush to exploit the new opportunity to discriminate. Indeed, attempts to use exemptions in this fashion have already occurred. In Kansas, for example, the railroads initially challenged discrimination arising from the state's failure to assess railroad property at the same percentage of true market value as other commercial and industrial property and from the overvaluation of rail transportation property.[22] The railroads filed suit for each tax year between 1980 and 1988, and those suits were ultimately settled on the basis of injunctions that granted relief from that assessment ratio discrimination for each year.[23] In 1986, Kansas adopted

[22] *See, e.g., Atchison, T. & S.F. Ry. v. Lennen,* 732 F.2d 1495 (10th Cir. 1984); *Atchison, T. & S.F. Ry. v. Lennen,* 640 F.2d 255 (10th Cir.), *on remand,* 531 F. Supp. 220 (D. Kan. 1981).

[23] *See Atchison, T. & S.F. Ry. v. Duncan,* Nos. 80-4172, 80-4173, 80-4176, 80-4181, 80-1690, 81-1495, 82-1561, 82-1562, 82-1596, 83-4221, 83-4204, 84-4334 (D. Kan. Oct. 4, 1984) (Settlement Orders and Permanent Injunctions) (tax years 1980 through 1984); *Atchison, T. & S.F. Ry. v. Duncan,* No. 85-4269R (D. Kan. June 18, 1985) (Settlement Order and Permanent Injunction) (tax year 1985); *Atchison, T. & S.F. Ry. v. Duncan,* No. 86-4173-R (D. Kan. May 29, 1986) (Settlement Order and Permanent Injunction) (tax year 1986); *Atchison, T. & S.F. Ry. v. Duncan,* No. 87-4156R (D. Kan. May 27, 1987) (Settlement Order and Permanent Injunction) (tax year 1987); *Atchison, T. & S.F. Ry. v. Duncan,* No. 88-4110-R (D. Kan. May 23, 1988) (Settlement Order and Permanent Injunction) (tax year 1988).

a constitutional amendment providing for the classification of property for purposes of taxation, effective in tax year 1989. Kan. Const. art. XI, § 1. Based upon that amendment and the enactment of significant statutory exemptions in 1989, no ad valorem taxes are imposed on at least 80% of the aggregate value of commercial and industrial personal property. Since 100% of railroad personal property was subject to taxation, plaintiffs challenged these exemptions as discriminatory under subsection (b)(4). Again, plaintiffs were forced to initiate a suit each tax year, beginning with tax year 1989. And each year, the parties have settled the suits, agreeing that 80% of the railroad personal property would not be taxed.[24]

The lower courts thus have wisely rejected the loophole that petitioner urges this Court to open. Indeed, in addition to the court below, Pet. App. 9-13, every other federal appellate court to consider the issue has concluded that subsection (b)(4) proscribes discriminatory tax exemptions. *See Trailer Train Co. v. Leuenberger,* 885 F.2d 415 (8th Cir. 1988), *cert. denied,* 490 U.S. 1066 (1989); *Department of Revenue of Fla. v. Trailer Train Co.,* 830 F.2d 1567 (11th Cir. 1987); *Burlington N. R.R. v. Bair,* 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v.*

[24] *Burlington N. R.R. v. Rolfs,* No. 89-4124-R (D. Kan. Aug. 11, 1989) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax years 1989 and 1990); *Burlington N. R.R. v. Beshears,* No. 91-4109-R (D. Kan. June 13, 1991) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax year 1991); *Burlington N. R.R. v. Beshears,* No. 92-4120-C (D. Kan. June 1, 1992) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax year 1992); *Burlington N. R.R. v. Parrish,* No. 93-4119-DES (D. Kan. May 27, 1993) (Order Enjoining Assessment, Levy or Collection of Discriminatory Taxes) (tax year 1993).

State Bd. of Equalization of N.D., 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Even though the cases involving discriminatory tax exemptions have arisen under widely differing state statutes, the conclusion has been uniform: subsection (b)(4) proscribes state tax exemptions that result in discriminatory treatment.[25]

Any definition of discrimination under Section 11503 must serve the broad remedial purposes of the statute. The history, language, and entire structure of the statute manifest its intent to prohibit all forms of state tax discrimination against railroads. The only reasonable interpretation of it is that subsection (b)(4) is violated whenever railroad property is in fact subjected to significantly disparate tax treatment. This would occur, for example, in the instant case, where a substantial amount of non-railroad personal property is exempt from taxation, but railroad personal property is not. Without this protection, Congress's goal of eliminating all forms of state tax discrimination against railroads would be defeated.

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[25] The conclusion that subsection (b)(4) applies to discriminatory tax exemptions has followed from the conclusion that subsections (b)(1) through (b)(3) do not reach such exemptions. *See supra* note 18. But this interpretation of subsections (b)(1) through (b)(3) is not necessarily dictated by their text, and certainly not by their remedial purpose. Indeed, under statutes that are modeled on Section 11503 but do not include a catch-all such as subsection (b)(4), courts have held tax exemption discrimination to be prohibited. *E.g., Northwest Airlines, Inc. v. State Bd. of Equalization of N.D.*, 358 N.W.2d 515 (N.D. 1984); *cf. Arkansas-Best Freight Sys., Inc. v. Cochran*, 546 F. Supp. 915 (M.D. Tenn. 1982). In any event, if subsections (b)(1) through (b)(3) do not apply, then subsection (b)(4) must.

II. A DETERMINATION WHETHER PARTICULAR EXEMPTIONS RESULT IN DISCRIMINATION AGAINST RAILROADS MUST BE BASED ON A COMPARISON OF THE TAX TREATMENT OF SIMILAR CLASSES OF PROPERTY OF OTHER COMMERCIAL AND INDUSTRIAL TAXPAYERS

As a fall-back from petitioner's theory that discrimination resulting from exemptions is not prohibited by Section 11503 at all, petitioner urges that the discriminatory effect of exemptions should be decided through a wide-ranging evaluation of the "fairness" of the state's entire tax system. Petitioner's obvious hope is that through such an exercise, Section 11503 litigation could be rendered virtually unmanageable—and thus ineffective. This effort to force the courts into an evaluation of the entire tax structure of a state has been rejected by the lower courts for sound and valid reasons, and should be rejected for the same reasons by this Court.

This Court addressed an analogous issue in *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141, 143-47 (1979), where it considered whether a state tax on electricity, which in effect applied only to electricity generated in New Mexico and sold out of state, violated a federal statute that prohibited taxes on electricity that were discriminatory against out-of-state consumers. In attempting to defend the electricity tax, New Mexico argued that the state's entire tax structure should be considered in determining whether there was discrimination. This Court unanimously rejected that argument:

> [T]he federal statutory provision is directed specifically at a state tax 'on or with respect to the generation or transmission of electricity,' not to the entire tax structure of the State. . . . To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also the expressed intent of Con-

> gress in enacting it. Because the electrical energy tax *itself* indirectly but necessarily discriminates against electricity sold outside New Mexico, it violates that federal statute.

Id. at 149-50.

Similarly, Section 11503(b)(4) does not call for an examination of the state's entire tax system in order to determine whether an exemption is discriminatory. To the contrary, the structure of subsection (b)(4)—with its focus on individual taxes that result in discrimination—requires that any meaningful analysis of the discriminatory effect of an exemption be tightly focused on the tax at issue.[26] As Congress recognized, Section 11503 was not intended to interfere with state distinctions between traditional broad categories of property so long as railroad property was treated the same as other commercial and industrial property within the same category.[27] Indeed, these broad categories of property—real property, tangible personal property, and intangible personal property—were meant to serve as the benchmarks under subsection (b)(4) for determining whether railroad property is taxed the same as other commercial and industrial property within the same category. This means that taxes and exemptions on the personal property of railroads must be compared to taxes and exemptions on the personal property of other commercial and industrial taxpayers; taxes on railroad real property must be compared to taxes and exemptions on the real property of other commercial and industrial taxpayers; and various other taxes must be compared to their counterparts.

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[26] Subsection (b)(4), as originally enacted, also used the term "any other tax," not a term such as "any other tax system" or "any other set of taxes." § 306(1)(d), Pet. App. 39.

[27] *See* S. Rep. No. 1483 at 10-11 (Section 11503 was "not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of real property, tangible property, and intangible property").

Indeed, the Eighth Circuit flatly rejected the same sort of argument petitioner has made here in a case challenging North Dakota's exemption of the personal property of locally assessed businesses under subsection (b)(4):

> North Dakota's rationalization that they have an equitable tax system because of a business privilege tax is nothing more than an attempt to resurrect, in a different form, an exemption from [Section 11503] for states with a 'reasonable classification of property.' Congress did not accept the proposal and this court will not accept it.

Ogilvie v. State Bd. of Equalization of N.D., 657 F.2d at 210.

In challenges to other forms of tax discrimination brought under subsection (b)(4), the lower courts have recognized that requiring an inquiry into the state's entire tax structure would place an enormous burden upon courts and an impermissible burden upon railroads seeking to challenge a particular tax. For example, in *Burlington N. R.R. v. City of Superior*, 932 F.2d 1185 (7th Cir. 1991), the Seventh Circuit declined to review Wisconsin's entire tax system in a subsection (b)(4) challenge to the state's occupational tax on owners and operators of "iron ore concentrates docks," which affected only railroads because no other businesses operated these docks. As that court noted, it is "unrealistic to think a court could figure out whether different taxes on other activities might offset the burden on the railroad industry of a tax limited to railroads." *Id.* at 1187-88. The Seventh Circuit correctly concluded that subsection (b)(4) revealed "a congressional desire that courts avoid the thicket of incidence analysis," and refused to consider "whether the state's tax system as a whole avoids burdening the railroad industry disproportionately." *Id.* at 1188.

In *Kansas City S. Ry. Co. v. McNamara*, the Fifth Circuit similarly rejected Louisiana's argument that the

court should consider "the overall tax burden of the railroads" and "compare that burden with all other commercial and industrial taxpayers" in considering a subsection (b)(4) challenge to the state's gross receipts tax on railroads. 817 F.2d at 377. The Fifth Circuit recognized the "profound problems" with such an approach:

> Determining the intrinsic economic fairness of a tax system to a particular taxpayer is a paradigm of the kind of polycentric problem for which courts are ill-suited. In effect, we would have to determine the fairness of the tax system to *each and every* taxpayer in order to decide whether it was fair to *any one* of them. . . . Aside from the theoretical difficulty of assessing the basic fairness of a tax system, an attempt to make the assessment would be extraordinarily costly both to the parties and the judicial system.

Id.[28]

These decisions of the lower federal courts are clearly correct. Just as it says, the original language of subsection (b)(4) prohibits *any* tax that discriminates against railroads. § 306(1)(d), Pet. App. 39. As the Fifth Circuit aptly observed, there "is nothing in the statute that even suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state." *Kansas City S. Ry. Co. v. McNamara*, 817 F.2d at 377.

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[28] *See also Trailer Train Co.*, 929 F.2d at 1303 (concluding in subsection (b)(4) challenge to private car tax imposed solely on freight line companies that "it is not within our discretion to analyze the disputed tax in the context of Missouri's over-all tax structure"); *Alabama Great S. R.R. v. Eagerton*, 541 F. Supp. 1084 (M.D. Ala. 1982) (concluding that the entire tax structure should not be considered in subsection (b)(4) challenge to license tax on railroads), *on remand from*, 663 F.2d 1036 (11th Cir. 1981).

III. THE APPROPRIATE REMEDY FOR RECTIFYING STATE TAX DISCRIMINATION AGAINST RAILROADS SHOULD BE LEFT TO THE DISCRETION OF THE LOWER COURTS

Once a tax exemption has been found to violate subsection (b)(4), lower courts should have the discretion to fashion relief that results in the elimination of discrimination based on the facts and circumstances of the case. Given the great variety of discriminatory exemptions, AAR urges that no blanket form of relief be prescribed, and that this Court leave the lower courts sufficient discretion to deal effectively with the individual circumstances that come before them.

The lower federal courts have in fact tailored the remedy to the character of the violation in cases involving discriminatory exemptions. In *Ogilvie v. State Bd. of Equalization of N.D.*, 657 F.2d at 210, for example, the Eighth Circuit was faced with a statute that exempted the personal property of locally assessed businesses from taxation, but included personal property and trade fixtures in the assessment of railroad property subject to tax. Noting that "North Dakota has had a long history of tax discrimination against railroads," the court ordered the full exemption of railroad personal property—which was precisely the treatment other commercial and industrial property owners enjoyed. *Id.*

In *Burlington N. R.R. v. Bair*, 766 F.2d at 1223-25, Iowa gave 95% of other commercial and industrial property owners an exemption for personal property by means of "roll-backs" and tax credits, but failed to provide any such roll-backs or credits for railroads on the ground that its assessment of railroad property did not differentiate between real and personal property. In determining the relief to be afforded the railroads, the court concluded on the basis of the evidence before it that one-half of the railroad's property should be characterized as personal property and ordered that it be made subject to the same

roll-backs and tax credits accorded other commercial and industrial personal property. *Id.* at 1224-25.

In *Leuenberger*, 885 F.2d at 418, the Eighth Circuit enjoined the collection of the challenged tax on personal property on the basis of a finding that more than 75% of other commercial and industrial personal property was exempt. As that court reasonably concluded, "[w]hen three-fourths of the commercial and industrial property in the state is not taxed because personal property used in agriculturally-related business is exempt, railroads are discriminated against if their personal property is taxed." *Id.*

In other cases, courts have entered stipulated orders that award the railroads a form of "proportional" exemption similar to that accorded by statute to other commercial and industrial property. *See, e.g., Burlington N. R.R. v. Parrish*, No. 93-4119-DES (D. Kan. May 27, 1993) (granting plaintiffs an 80% exemption from personal property taxation in light of Kansas' 80% non-taxation of all other commercial and industrial property). These cases illustrate the wide variety of circumstances in which discrimination via exemption can be found and the importance of leaving the lower courts with a substantial measure of discretion in fashioning the relief appropriate for a particular case.

This is not to say, of course, that the lower courts should be left without standards. Indeed, the cases to date suggest several factors that are appropriate for consideration when the district court is devising a remedy for discriminatory exemptions. One factor clearly should be the extent of the discrimination. An egregious form of discriminatory exemptions, such as that before the Eighth Circuit in *Ogilvie*, may well justify an absolute injunction. Similarly, a particularly complicated web of exemptions, which makes the crafting of a more precise form of relief exceptionally difficult, may justify an injunction against collection of the tax from the railroads—until the legislative body has devised a non-discriminatory system of taxes

and exemptions. Finally, a state's record of past discriminatory taxation against railroads should be an appropriate factor for consideration in deciding the nature of the relief to be awarded. Where a state has a history of recalcitrance, pursuing progressively more complicated efforts to continue collecting a disproportionate share of tax revenue from the railroads, an injunction against the current exemption-based discrimination may well be justified on that basis alone to compel adherence to the mandate of Section 11503.

In this case, based on the stipulated facts, the court of appeals concluded that the discriminatory Oregon tax should be enjoined. That conclusion was well within its discretion and consonant with the statutory mandate and the decisions of other lower courts. Indeed, the facts in this case closely parallel those in *Leuenberger*, where the Eighth Circuit ordered the same relief.

As Congress recognized, Section 11503 was designed to serve as a "plain, speedy, and effective remedy to eliminate discriminatory tax assessment and classification practices." S. Rep. No. 1483 at 7. In light of the wide range of possible discriminatory exemptions, it is essential that the lower courts retain the discretion to fashion an appropriate remedy based on the facts and circumstances of each individual case, in order to ensure railroads the "effective remedy" Congress envisioned.

CONCLUSION

For the foregoing reasons, AAR urges the Court to hold that Section 11503(b)(4) prohibits state tax discrimination against railroads that results from exemptions, and to hold that the court below acted within its discretion in fashioning the relief granted.

Respectfully submitted,

ROBERT W. BLANCHETTE
KENNETH P. KOLSON
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2511

BETTY JO CHRISTIAN *
TIMOTHY M. WALSH
JERALD S. HOWE, JR.
RODERICK L. THOMAS
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000

* Counsel of Record

Counsel for Amicus Curiae Association of American Railroads

Dated: September 2, 1993